SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1974

No. ____

RALEIGH H. LAWHON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS D. AITKEN
of
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
P. O. Box 3239
Tampa, Florida 33601
Counsel for Petitioner

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

INDEX

	Page
Reference to Opinions Below	1
Grounds on Which Jurisdiction is Invoked	1
The Questions Presented for Review	2
Statement of the Case	2
Reasons for Allowance of the Writ	5
Conclusion	9
Appendix A - Opinion of the Court of Appeals	A- 1
Appendix B - Indictment	A-12
Appendix C - Answer to Defendant's Motion for Further Bill of Particulars	A-17
Appendix D - Excerpt from Trial Court's Charge to Jury	A-21

AUTHORITIES CITED

CASES	Page
Blair v. Commissioner, 300 U.S. 5 (1937)	5
Corliss v. Bowers, 281 U.S. 376 (1930)	5, 6, 7, 9
James v. United States, 366 U.S. 213 (1961)	7, 8
Poe v. Seaborn, 282 U.S. 101 (1930)	5, 6
Poonian v. United States, 294 F.2d 74 (9th Cir. 1961)	8
Rutkin v. United States, 343 U.S. 130 (1952)	7, 8
United States v. Mitchell, 403 U.S. 190 (1971)	5

STATUTES	
26 U.S.C. §7201	3, 4
26 U.S.C. §7206(1)	3, 4
28 U.S.C. §1254(1)	1

IN THE

Supreme Court of the United States

October Term, 1974

NO.

RALEIGH H. LAWHON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 16, 1974.

REFERENCE TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A, has not been officially reported at the time of filing this petition, but has been unofficially reported at 74-2 U. S. Tax Cas. ¶9634 and 34 AFTR 2d ¶74-5206.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was entered on August 16, 1974. Petitioner's motion for rehearing was denied by the Court of Appeals on October 7, 1974. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. Section 1254(1).

THE QUESTIONS PRESENTED FOR REVIEW

1. Where a father manages citrus groves owned by his adult children, markets the fruit for them, keeps a record of the fruit sales for each child and distributes the net proceeds to them from time to time, may the Court of Appeals depart from the hornbook law that income from the sale of fruit is taxable to the owner of the fruit, and uphold a charge to the jury that the father is criminally liable for failing to report the proceeds as his own fruit income if he has "possession and the ability to enjoy" the funds?

2. If the first question is answered in the affirmative, is the father to be held taxable upon all the fruit sale proceeds he receives for his children's fruit, without reduction for the distributions of moneys made by him to the children during the years in question?

STATEMENT OF THE CASE

The Petitioner, R. H. Lawhon ("Lawhon"), has owned and managed citrus groves in Florida since 1919. Between 1940 and 1960 he helped his four children acquire groves of their own, which he managed for them. The children's fruit was sold to Florida Orange Marketers ("F.O.M.") under a contract in the name of "R. H. Lawhon Associates" ("Associates"). Lawhon had a separate contract with F.O.M. covering his own groves, which groves he transferred to a family-owned corporation (recommended by an accountant for estate planning purposes) in March, 1963. Many of the checks payable to Associates were commingled with Lawhon's own funds and with funds of the corporation. However,

Lawhon kept a record of the proceeds and expenses of each child's grove and distributed the net proceeds to the children from time to time in various forms, including checks, deposits to savings, and certificates of deposit.

During the years involved, Turnbull and Wicker, two of Lawhon's sons-in-law, had taken over the operation of their wives' groves, leaving Lawhon's other two children, Charles and Dorothy, as the only children whose fruit was marketed under the Associates contract. During these years both Charles and Dorothy were missionaries overseas. Charles and Dorothy did not report many of the certificates of deposit, deposits to savings and other distributions of their fruit proceeds as income (although Charles, a Government witness at the trial, testified that they were distributions of his fruit income). However, instead of pursuing the collection of the tax on the fruit proceeds from Charles and Dorothy, the Government indicted Lawhon in 1969, (Appendix B) alleging in the Bill of Particulars (Appendix C) that he should have reported as his own fruit income the total checks he received for fruit sold (including checks to Associates), less the amounts deemed by the Government to constitute fruit marketed for others.

The Indictment charged four counts of making and subscribing false income tax returns for the years 1962, 1963, 1964 and 1965 under 26 U.S.C. Section 7206(1) and three counts of attempted tax evasion for the years 1963, 1964 and 1965 under 26 U.S.C. Section 7201. In 1970, Lawhon was tried before a jury in Orlando, Florida, which found him not guilty under count one and guilty under counts four through seven. A mistrial was declared as to counts two and three because the jury

could not reach a decision. In 1972, a new trial was ordered by the trial judge, primarily for failure of proof of the alleged fruit income and improper argument of Government counsel. In 1973, Lawhon was tried again in Orlando by a different trial judge and was convicted by a jury of all six counts.

The key factors leading to the conviction were two errors of law:

(1) The trial court's erroneous charge to the jury (Appendix D), over objection, that Lawhon was taxable on the proceeds of sale of his children's fruit if he had "unfettered command" of the proceeds.

(2) The trial court's refusal to require the Government to reduce the alleged fruit income by the amounts Lawhon distributed to his children out of their fruit proceeds.[1]

Both of these erroneous rulings were approved by the Court of Appeals.

The basis for federal jurisdiction in the United States District Court was the alleged violation of federal statutes, 26 U.S.C. Sections 7201 and 7206(1).

---

[1] In 1963, there were checks, C.D.'s and other distributions to the children totalling $47,704.63, for which no reduction was allowed by the Government. In 1965, the distributions not allowed as reductions totalled $33,661.25. Also, in 1963, Lawhon sold fruit for Gerald and Barbara Wicker for $6,379.63, which amount the Government alleged as part of the $41,800.33 reductions in the Bill of Particulars (Appendix C), but did not allow as a reduction at the trial, even though it had asserted the $6,379.63 in a "30-day letter" to be the Wickers' income for the same year!

REASONS FOR ALLOWANCE OF THE WRIT

It is important that the decision of the Court of Appeals below be reviewed by this Court and reversed, for the following reasons.

1. The decision upholding the conviction of Lawhon for failing to report the income from the sale of his children's fruit is an irreconcilable departure from the decisions of this Court, holding uniformly that ownership determines the taxability of income resulting from the sale or use of property. *Poe v. Seaborn,* 282 U.S. 101 (1930); *Blair v. Commissioner,* 300 U.S. 5 (1937); *United States v. Mitchell,* 403 U.S. 190 (1971).

A. *The "Unfettered Command" Problem.*

The Court of Appeals approved the charge to the jury that,

> "If a person other than the owner receives the income and the recipient has *unfettered command* and freedom to enjoy the income as his own at his option, then such income may be taxable to him even though he did not own the property which produced the income." (Emphasis supplied),

citing as authority the decision of this Court in *Corliss v. Bowers,* 281 U.S. 376 (1930).

However, *Corliss v. Bowers* is not authority for the proposition that "unfettered command" is the test of taxability of income from the sale of property. The question in *Corliss v. Bowers* was whether Congress had the power to enact a statute taxing the income from a revocable trust to the grantor. Therefore, when this Court stated in *Corliss* that the income subject to

a man's unfettered command "may be taxed to him as income", it was referring to a specific statute taxing grantors of revocable trusts, and not to any general principle of tax law making persons in receipt of income from property owned by others taxable on that income.[2] In fact, this Court, in *Poe v. Seaborn, supra,* decided in the same year as *Corliss,* rejected the very argument by the Commissioner of Internal Revenue which the Court of Appeals accepted in this case, i.e., that control of property and the income therefrom, rather than ownership, is the test of taxability.

It is clear that the decision in *Corliss v. Bowers* was both misunderstood and misapplied by the trial court and the Court of Appeals. The Court of Appeals' decision, therefore, based upon a misunderstanding of the *Corliss* case, makes completely new law in the field of taxation (presumably in "civil" as well as criminal tax cases) which is an irreconcilable departure from the long-established rule of ownership in determining taxability.

---

[2] This was explained by this Court in *Poe v. Seaborn, supra,* as follows:

> "The Corliss case raised no issue as to the intent of Congress, but as to its power. We held that where a donor retains the power at any time to revest himself with the principal of the gift, Congress may declare that he still owns the income. While he has technically parted with title, yet he in fact retains ownership, and all its incidents."

Moreover, the trial court's definition of "unfettered command" (*possession* and ability to enjoy) was exactly the opposite of what this Court held to be unfettered command in *Corliss.* In *Corliss,* the grantor did not have possession; his unfettered command was his legal right to revoke the trust and take back the property from the trustee. Therefore, *possession* has nothing to do with "unfettered command", and the trial court's charge was clearly erroneous.

B. *The "Unlawful Gains" Problem.*

In addition to the misapplication of *Corliss v. Bowers,* the Court of Appeals' decision misapplied the law of taxability of unlawful gains, when it cited this Court's decision in *Rutkin v. United States,* 343 U.S. 130 (1952), in support of its holding that, "regardless of who owned the fruit, the income should be taxed to Lawhon, since he had 'such control over it that, as a practical matter, he derive[d] readily realizable economic value from it.'" (Appendix A, p. A-8)

It is clear from the decisions of this Court, principally *Rutkin, supra,* and *James v. United States,* 366 U.S. 213 (1961), that one who obtains income by embezzlement or extortion from the true owner is taxable on it without regard to ownership. These "unlawful gains" cases, then, are an exception to the rule that ownership determines taxability. However, it is also clear that moneys which are restored to the true owner are not taxed to the embezzler. *James v. United States, supra,* at 220. Therefore, in upholding the conviction based upon the "control" or "unlawful gains" theory, the Court of Appeals should have held that the distributions Lawhon made to his children were not to be included as taxable income to Lawhon. Instead, the Court of Appeals held that, because the children did not report the distributions to them as income, the distributions might have been gifts. In other words, the Court of Appeals held that Lawhon was taxable on funds he embezzled, extorted, converted or misappropriated from his children, unreduced by amounts he distributed to them, because they might have been gifts to the children out of the fruit proceeds he misappropriated, rather than distributions of their income! Beyond the fact that this is an illogical and even bizarre interpretation of the facts, the law as stated

in *James v. United States, supra*, makes no distinctions as to the motives of an embezzler in restoring income to the true owners, whether out of donative intent, by accident or for any other reason. The law of *James* is clear that all amounts restored to the owner are allowed as a reduction of the amount of ill-gotten gains originally appropriated by the wrongdoer.

2. The decision of the Court of Appeals is *contra* to the decision of the United States Court of Appeals for the Ninth Circuit in *Poonian v. United States*, 294 F.2d 74 (9th Cir. 1961), which is squarely in point. *Poonian* held that one who is charged in an indictment with failure to report his farm income cannot be convicted if the evidence shows that the income belonged to someone else. Thus, in addition to the problems of taxability pointed out above, there was fatal variance between pleading and proof where the indictment charged that Lawhon willfully understated *his fruit income*, whereas the proof showed that the income in question was *not his fruit income*. The decision of the Court of Appeals approves the variance by holding the income taxable to Lawhon, not as his fruit income, but as fruit income of others over which he exerted "unfettered command" or "control".

3. The potential applications of the Court of Appeals' decision are frightening. There is nothing in the opinion to prohibit the application of the "unfettered command" theory to any situation where an agent receives income on behalf of a principal. Unlike the *Rutkin* and *James* cases, *supra*, the income does not have to be converted by the agent to his own use, so long as he has (in the language of the trial court) "freedom to enjoy the income as his own at his option". Additionally, unlike *Rutkin* and *James*, the Govern-

ment need not reduce the alleged income of the agent by the amounts paid to the principal if the Government feels the agent made the payments to the principal with a donative intent.

CONCLUSION

The decision below should be reviewed by this Court because it is *contra* to a decision of the Ninth Circuit Court of Appeals, and because it distorts the law of taxation in the following particulars:

1. It cites the decision of this Court in *Corliss v. Bowers* as authority for a legal proposition never intended by this Court, i.e. that anyone who has possession of and ability to enjoy someone else's income is taxable on that income.

2. It holds that in taxing income to one who has obtained it through unlawful means, such as embezzlement or extortion, no reduction is allowed for amounts restored to the true owner if a donative intent existed.

It is respectfuly requested that a writ of certiorari issue.

THOMAS D. AITKEN
of
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P A.

P. O. Box 3239
Tampa, Florida 33601

Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Raleigh H. LAWHON, Defendant-Appellant.

No. 73–3933.

United States Court of Appeals,
Fifth Circuit.

Aug. 16, 1974.

Defendant was convicted in the United States District Court for the Middle District of Florida, at Orlando, Richard M. Duncan, J., sitting by designation, of making and subscribing false income tax returns and of attempted tax evasion, and he appealed. The Court of Appeals, Dyer, Circuit Judge, held that the prosecution properly proved venue in the Middle District of Florida; that the trial court properly charged the jury that the question before it was whether defendant enjoyed "unfettered command" over the proceeds from the sale of fruit grown in groves owned by his children, rather than the mere ownership of the groves; that the Government was not required to assume the burden of introducing evidence of all items which defendant claimed should have been allowed as reductions in his taxable income; and that the Government was properly allowed to use a summary chart for purposes of showing the deductions from defendant's gross income which it contended were proper.

Affirmed.

1. Criminal Law ⇐113

Although venue in prosecution for making false income tax returns is proper in district where return was made and subscribed, venue may also lie in district in which return was filed. 26 U.S.C.A. (I.R.C.1954) §§ 6091, 7206(1).

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1974, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

2. Criminal Law ⇐113

Especially in view of fact that taxpayer nowhere affirmatively suggested that venue for prosecution for making false income tax returns and attempted tax evasion should have been laid in any other district, proper venue in Middle District of Florida was shown by proof that taxpayer was resident of and had his principal place of business in Florida, that he was required to file his return with IRS district director in Jacksonville, and that returns were subsequently produced from files of that district director. 26 U.S.C.A. (I.R.C.1954) §§ 6091, 7206(1).

3. Internal Revenue ⇐2459

Where, although taxpayer contended in prosecution for making false income tax returns and attempted tax evasion that he had distributed income from orange groves owned by children by purchasing certificates of deposit for them, evidence also showed that children had not reported receipts as income on their own tax returns, trial court correctly instructed jury that question was whether taxpayer enjoyed "unfettered command" over proceeds from fruit sales from children's groves, not merely who owned groves in question. 26 U.S.C.A. (I.R.C.1954) §§ 7201, 7206(1).

4. Internal Revenue ⇐2447

Where Government's proof against taxpayer in prosecution for making false income tax returns and attempted tax evasion was based upon specific items method of proof, whereunder prosecution first introduced evidence of taxpayer's gross income and then presented its view of items which should be subtracted to arrive at taxable income, Government was not required to shoulder burden of introducing evidence of all items which taxpayer claimed should have been allowed as reductions. 26 U.S.C.A. (I.R.C.1954) §§ 7201, 7206(1).

5. Criminal Law ⇐400(8)

Summary chart was properly used in prosecution of taxpayer for making false income tax returns and attempted tax evasion where primary evidence on which chart was based was

available for testing accuracy of summary, agent who prepared chart was available for cross-examination, and jury was instructed that chart was merely aid in understanding underlying documents and records and contained only Government's view of case. 26 U.S.C.A. (I.R.C.1954) §§ 7201, 7206(1).

6. Internal Revenue ⇐2461

Although use of more neutral term than "Computation of Fruit Income" might have been preferable in summary chart used by government in prosecution of taxpayer for making false income tax returns and attempted tax evasion, Government's choice of semantics was nonprejudicial to taxpayer. 26 U.S.C.A. (I.R.C.1954) §§ 7201, 7206(1).

7. Criminal Law ⇐858(3)

Trial court did not abuse its discretion in refusing to allow summary chart prepared by taxpayer in prosecution for making false income tax returns and attempted tax evasion to be distributed to jury during closing argument, particularly since defense counsel was allowed to use marker and easel to illustrate his contentions. 26 U.S.C.A. (I.R.C.1954) §§ 7201, 7206(1).

8. Criminal Law ⇐400(8)

Record in prosecution of taxpayer for making false income tax returns and attempted tax evasion did not support contention that agent who prepared summary charts used during trial to illustrate Government's method of arriving at taxpayer's taxable income attempted to pass on credibility of witnesses or otherwise to invade province of jury. 26 U.S.C.A. (I.R.C.1954) §§ 7201, 7206(1).

Appeal from the United States District Court for the Middle District of Florida.

Before BROWN, Chief Judge, and RIVES and DYER, Circuit Judges.

DYER, Circuit Judge:

Lawhon seeks to upset his conviction for making and subscribing false income tax returns for the years 1963, 1964 and 1965, in violation of 26 U.S.C.A. § 7206(1), and for attempted tax evasion for the same years in violation of 26 U.S.C.A. § 7201. He makes three basic contentions: first, that venue was not proved; second, that the Government's theory of taxability was unsound; and third, that the Government failed properly to discharge its burden of proof. Finding no merit to these and other assignments of error, we affirm.

For many years Lawhon has owned and managed citrus groves in Florida. Since about 1940 he also managed orange groves which were owned by his four children. The produce of the children's groves was sold to various fruit marketers through contracts in the name of "R. H. Lawhon Associates" (Associates). The checks payable to Associates from fruit buyers sometimes went directly to the children, but often were sent to Lawhon. The Associates' proceeds received by Lawhon were commingled with Lawhon's other funds, but the appellant kept a journal at his home showing his computations of the proceeds from the fruit sales and the allocation to his children of expenses and profit. From time to time Lawhon would purchase certificates of deposit for his children, make deposits in their savings accounts, or write checks to cover their personal expenses. Only a fraction of these payments, however, were reported by the children on their respective income tax returns.

The proceeds of the Associates' fruit sales were usually deposited either in Lawhon's personal bank accounts or in the accounts of family corporations which he controlled. After subtracting certain "reductions" from Lawhon's income, such as amounts of fruit income reported on the children's tax returns, the Government calculated that Lawhon was taxable on the proceeds from the sale of fruit in 1963 in the amount of $181,741.72; in 1964, $81,023.81; and in 1965, $20,106.45. In contrast to these alleged total receipts, Lawhon reported on

his tax returns for those years $116,039.00 in 1963, $712.00 in 1964, and zero in 1965. The Government also asserted that Lawhon understated his income from interest in 1963 by $3,912.28; by $16,982.46 in 1964; and by $1,114.32 in 1965.[1]

Under a seven-count indictment returned in 1969, Lawhon was tried before a jury, was acquitted of making a false income tax return for 1962, but was convicted for attempted tax evasion for the three following years, as well as for making a false tax return in 1965. The jury, however, was unable to reach a decision on the charges that Lawhon had made a false tax return in either 1963 or 1964; consequently, the district court declared a mistrial on the last two charges. The court also granted a new trial on the four other counts of which he had been found guilty. The primary reason given by the district court for granting the retrial was the Government's faulty evidentiary presentation of a summary chart of income reductions.[2] In the first trial, the prosecution prepar-

1. Lawhon concedes that there was an understatement of interest income in 1964 and 1965 in the amounts asserted by the Government. He contends, however, that the understatement for 1963 was only $209. Even accepting Lawhon's calculations for 1963, we disagree that willfulness cannot be inferred, especially in view of our determination, *infra*, that the Government proved a three-year pattern of substantially understating farm income.

2. The pertinent part of the district court's order granting the new trial reads:

> The issue, then, is whether the Government had the burden of proving reductions to gross income or whether its offer to make the reductions through [the original summary chart] without proof was sufficient so that its rejection by defendant leaves the defense without a basis for complaint. This Court concludes that the Government had the burden of proving by competent evidence both the gross income and reductions so that the net income would be established by proof.
>
> * * * * * * * * * *
>
> The failure of the Government to offer evidence of the alleged gifts of certificates of deposits resulted in an incomplete picture. The evidence relative to certificate of deposit purchases should have been available to the jury; if they were not reductions as a matter of law, the question of whether they were gifts from defendant's income or distribution of his children's income should have been for the jury.

ed a chart listing all amounts which the Government recognized as allowable reductions from Lawhon's fruit receipts. Defense counsel successfully objected to the introduction of the chart on the ground that it was not supported by evidence in the record. A revised chart was prepared by the Government which did contain the requisite evidentiary backing, but both the revised chart in the first trial and the chart employed in the second trial allowed Lawhon fewer reductions from income than the original summary.[3]

After a second jury trial befor different judge, Lawhon was found guilty of all six char; d was fined $9,000. This appeal followed.

[1] The first assignment of r is that the prosecution failed to prove venue in the M District of Florida. Section 7206(1) of the Interna evenue Code proscribes "mak[ing] and subscrib[ing]" a e income tax return, and Lawhon points out that the Gove nent offered no proof that these acts were done in the Middle District of Florida. Although venue is proper in the district where the return was made and subscribed, United States v. Hagan, D.Md.1969, 306 F.Supp. 620, venue may also lie in the district in which the return was filed. United States v. Gilkey, E.D.Pa.1973, 362 F.Supp. 1069. The question, then, is whether the Government showed by a preponderance of the evidence that Lawhon's returns were filed in the district in which he was convicted.

3. Because the transcript of the first trial is not in the record in this appeal, we do not know what objection, if any, defense counsel made to the introduction of the revised summary. The record of the second trial, however, indicates that while the defense was not satisfied with the summary chart which allowed a greater aggregate of reductions than the revised chart in the first trial—but still a lesser total amount than allowed on the original chart—the district court gave the defense an opportunity to examine the chart before admitting it into evidence. The record also shows that the defense had the opportunity, not fully exploited, to impeach the agent who prepared the chart with the inconsistency between the original and the later positions of the Government.

Cauley v. United States, 5 Cir. 1966, 355 F.2d 175, cert. denied, 384 U.S. 951, 86 S.Ct. 1572, 16 L.Ed.2d 548.

[2] The district court found that the returns were filed in Jacksonville, thus establishing venue in the Middle District of Florida. The finding was based on evidence which showed that Lawhon was a resident of and had his principal place of business in Florida, that he was required to file his returns with the IRS District Director in Jacksonville,[4] and that the returns were subsequently produced from the files of the District Director in Jacksonville. We conclude that this evidence was sufficient to support the inference that the returns were filed in Jacksonville, United States v. Graves, 5 Cir. 1970, 428 F.2d 196, cert. denied, 400 U.S. 960, 91 S.Ct. 360, 27 L.Ed.2d 269, especially in view of the fact that Lawhon nowhere affirmatively suggests that venue should have been laid in any other district. *Cf.* Hill v. United States, 9 Cir. 1960, 284 F.2d 754, 755, cert. denied, 1961, 365 U.S. 873, 81 S.Ct. 908, 5 L.Ed.2d 862.

[3] The next issue is whether the Government's theory of taxability was defective since Lawhon's children held title to the citrus groves and therefore owned the fruit marketed by the appellant. In support of the contention that his children, as the owners of the groves, were the ones liable for the income tax, Lawhon relies on a number of cases which have focused on ownership in determining tax liability, *see, e. g.*, Poe v. Seaborn, 1930, 282 U.S. 101, 51 S.Ct. 58, 75 L.Ed. 239; Camp Wolters Land Co. v. Commissioner, 5 Cir. 1947, 160 F.2d 84, and on cases in which a parent was held not taxable on income derived from the management and sale of property owned by his children, *see, e. g.*, Alexander v. Commissioner, 5 Cir. 1951, 190 F.2d 753; Visintainer v. Commissioner, 10 Cir. 1951, 187 F.2d 519, cert. denied, 342 U.S. 858, 72 S.Ct. 85, 96 L.Ed. 646. The Government does not challenge the principles established by these decisions, but does dispute their applica-

4. 26 U.S.C.A. § 6091.

bility to the case now before us. The Government argues that the district court properly charged the jury that the question was whether Lawhon enjoyed "unfettered command" over the proceeds from the fruit sales. Corliss v. Bowers, 1930, 281 U.S. 376, 50 S.Ct. 336, 74 L.Ed. 916. We agree that the charge to the jury was correct.

The facts in the case *sub judice* are subject to conflicting interpretations. For example, the defense argues that the certificates of deposit purchased by Lawhon for his children were not gifts, but rather constituted an informal method of distributing the children's income. Weighing against this view is the Government's evidence that the children had not reported the receipts as income on their tax returns. While we do not suggest that a taxpayer can be held liable for failing to report another's income, that, of course, is not the Government's position in this case. Rather, the contention is that the evidence was sufficient to give rise to a jury question of whether, regardless of who owned the fruit, the income should be taxed to Lawhon since he had "such control over it that, as a practical matter, he derive[d] readily realizable economic value from it." Rutkin v. United States, 1952, 343 U.S. 130, 137, 72 S.Ct. 571, 575, 96 L.Ed. 833.

Poonian v. United States, 9 Cir. 1961, 294 F.2d 74, gives no support to Lawhon's theory that ownership alone controls tax liability. In that case, a conviction for tax evasion was reversed because of a fatal variance between the indictment and the evidence adduced at the trial. Poonian was charged with failing to fully report *his* income, but the evidence failed to establish that the receipts from a farming operation were not his mother's, but his own. Although the court noted that Poonian was acquitted of other counts because his mother was found to be the owner of the income-producing property, nothing in the opinion suggests that only the owner could be taxed on farm receipts. Rather, the decision turned on the Government's failure to carry its burden of proof that Poonian himself had realized income. Finding no merit to the

contention that the factor of ownership alone is outcome-determinative, we conclude, as did the court in *Poonian*, that the only question is whether the Government properly proved Lawhon's tax liability on the proceeds from the Associates' fruit sales.

[4] The assignment of error which Lawhon presses most strongly concerns the burden of proving reductions for tax purposes from gross fruit receipts. The Government's case was based upon the specific items method of proof; that is, the prosecution first introduced all the produce receipts which it considered to be income to the taxpayer, then presented its view of the items which should be subtracted from the gross proceeds to arrive at Lawhon's taxable income. The nub of Lawhon's position is that the Government had the burden not just to show the items which it considered to be reductions, but also to introduce evidence of any item which the jury might find to be an allowable reduction. More specifically, the contention is that the Government should have introduced evidence of the amounts Lawhon gave to his children in the form of certificates of deposit, for example, even though the prosecution considered them to be not reductions but gifts. This argument seems to rely upon an analogy to a prosecution for tax evasion based on the net worth theory, *see generally* Holland v. United States, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, in which the prosecution has the burden to follow up on all reasonable leads which, if true, could establish the taxpayer's innocence. *See also* Merritt v. United States, 5 Cir. 1964, 327 F.2d 820. Similarly, in cases based on the bank deposit method of prosecution, the Government is required to prove that it has tried to discover and exclude all non-income items from the alleged tax deficiency. *See, e. g.*, United States v. Morse, 1 Cir. 1974, 491 F.2d 149; Kirsch v. United States, 8 Cir. 1949, 174 F.2d 595. None of these cases, however, undergirds the proposition that the Government must introduce those items which it does not believe entitle the taxpayer to a reduction in the alleged understatement of

his taxes. We find neither precedent nor good reason for reversing this conviction because the Government failed to shoulder the burden of introducing evidence of all items which the taxpayer claims should have been allowed as reductions.

To the extent that the district court's original order in the first trial granting a new trial[5] is inconsistent with our conclusion, we disagree with it. While the order is not entirely free from ambiguity, a fair interpretation of the court's language reveals two concerns: first, that the Government's summary chart be based upon evidence before the jury; and second, that the jury have before it evidence which would support the taxpayer's contention that other reductions should have been allowed. After reviewing the record and exhibits, we are satisfied that both of these conditions were met.

[5] Moreover, we detect no infirmity in the manner in which the summary chart was utilized. The primary evidence on which the chart was based was available for testing the accuracy of the summary; the agent who prepared the chart was available for cross-examination; and the jury was properly instructed that the chart was merely to aid in understanding the underlying documents and records. United States v. Kane, 5 Cir. 1971, 450 F.2d 77, 85, cert. denied, 1972, 405 U.S. 934, 92 S.Ct. 954, 30 L.Ed.2d 810; Gordon v. United States, 5 Cir. 1971, 438 F.2d 858, 876–877, cert. denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56. Furthermore, contrary to the appellant's assertion, the jury was instructed that the summary chart presented only the Government's view of the case. Myers v. United States, 5 Cir. 1966, 356 F.2d 469, cert. denied, 384 U.S. 952, 86 S.Ct. 1572, 16 L.Ed.2d 548.

Apparently the Government changed its view of some of the reductions which it was willing to allow in the revised summary produced at the second trial. The defense did have the opportunity to introduce evidence of any additional reductions which would have negated the charges that Lawhon under-

5. *See* note 1, *supra*.

stated his income for the three years in question. Moreover, defense counsel questioned the agent who prepared the charts and elicited from him the fact that he had omitted items which Lawhon believed should have been included. Thus all the relevant evidence was before the jury, and the appellant cannot complain because the jury chose not to accept his theory of the case.

[6–8] We mention briefly several minor issues related to the use of the charts. First, the captions on the charts are said to have been unduly suggestive. For example, one read, "Computation of Fruit *Income*." (emphasis added). Although the use of a more neutral term, such as "Fruit Receipts," might have been preferable, we refuse to ascribe error to a non-prejudicial choice of semantics. *Compare* Lloyd v. United States, 5 Cir. 1955, 226 F.2d 9, 17. Secondly, we are unpersuaded that the district court abused its discretion in refusing to allow a summary chart prepared by the defense to be distributed to the jury during closing argument, *cf.* United States v. Stone, 5 Cir. 1973, 472 F.2d 909, 914, particularly since defense counsel was allowed to use a marker and easel to illustrate its contentions. We are also unpersuaded that the use of the Government's charts in this case was similar to that method condemned in Steele v. United States, 5 Cir. 1955, 222 F.2d 628. The record simply does not support the contention that the agent who prepared the charts attempted to pass on the credibility of the witnesses or otherwise to invade the province of the jury.

We have considered the other contentions raised by Lawhon and conclude that the judgment is free from reversible error.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

No. 69- ///-Cr-J
(26 USC 7206(1))
(26 USC 7201)

RALEIGH H. LAWHON

The Grand Jury charges:

COUNT ONE

That on or about the 15th day of April, 1963, in the Middle District of Florida, RALEIGH H. LAWHON, a resident of Avon Park, Florida, did wilfully and knowingly make and subscribe a Form 1040, U. S. Individual Income Tax Return, for the calendar year 1962 in the names of Raleigh H. and Miriam Lawhon, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director of Jacksonville, Florida, which said Form 1040 for the year 1962 he did not believe to be true and correct as to every material matter in that the said 1962 Form 1040 under Schedule B, Part II, entitled "Interest Income" bore total interest of $2,756.90 whereas, as he then and there well knew and believed, the interest income to be $11,452.37; in violation of Section 7206(1), Internal Revenue Code; Title 26, United States Code, Section 7206(1).

COUNT TWO

That on or about the 11th day of February, 1964, in the Middle District of Florida, RALEIGH H. LAWHON, a resident of Avon Park, Florida, did wilfully and knowingly make and subscribe

a Form 1040, U. S. Individual Income Tax Return, for the calendar year 1963 in the names of Raleigh H. and Miriam Lawhon, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at Jacksonville, Florida, which said Form 1040 for the year 1963 he did not believe to be true and correct as to every material matter in that the said 1963 Form 1040 under Schedule B, Part II, entitled "Interest Income" bore total interest of $7,250.00, and Schedule F (Schedule of Farm Income and Expenses) bore gross receipts of $116,039.00; whereas, as he then and there well knew and believed, the interest income to be $11,162.28, and the Schedule F gross receipts to be $161,736.21; in violation of Section 7206(1), Internal Revenue Code; Title 26, United States Code, Section 7206(1).

COUNT THREE

That on or about the 30th day of March, 1965, in the Middle District of Florida, RALEIGH H. LAWHON, a resident of Avon Park, Florida, did wilfully and knowingly make and subscribe a Form 1040, U. S. Individual Income Tax Return, for the calendar year 1964 in the names of Raleigh H. and Miriam Lawhon, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at Jacksonville, Florida, which said Form 1040 for the year 1964 he did not believe to be true and correct as to every material matter in that the said 1964 Form 1040 under Schedule B, Part II, entitled "Interest Income" bore total interest of $6,104.00, and Schedule F (Schedule of Farm Income and Expenses) bore gross receipts of $712.00; whereas, as he then and there well knew and believed, the interest income to be $23,086.46, and the Schedule F gross

receipts to be $74,181.60; in violation of Section 7206(1), Internal Revenue Code; Title 26, United States Code, Section 7206(1).

COUNT FOUR

That on or about the 28th day of March, 1966, in the Middle District of Florida, RALEIGH H. LAWHON, a resident of Avon Park, Florida, did wilfully and knowingly make and subscribe a Form 1040, U. S. Individual Income Tax Return, for the calendar year 1965 in the names of Raleigh H. and Miriam Lawhon, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the District Director at Jacksonville, Florida, which said Form 1040 for the year 1965 he did not believe to be true and correct as to every material matter in that the said 1965 Form 1040 under Schedule B, Part II, entitled "Interest Income" bore total interest of $6,088.00, and Page 2, Part II (Income from all sources other than wages, salaries, etc.) line 7, Farm Income, was left blank; whereas, as he then and there well knew and believed, the interest income to be $7,202.32, and the farm income to be $17,775.07; in violation of Section 7206(1), Internal Revenue Code; Title 26, United States Code, Section 7206(1).

COUNT FIVE

That on or about the 11th day of February, 1964, in the Middle District of Florida, RALEIGH H. LAWHON, a resident of Avon Park, Florida, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America, for the calendar year 1963, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Jacksonville,

at Jacksonville, Florida, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $33,885.00, and that the amount of tax due and owing thereon was the sum of $ 0,507.00; whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $85,436.70, upon which said taxable income he owed to the United States of Americ an income tax of $31,629.32; in violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

COUNT SIX

That on or about the 30th day of March, 1965, in the Middle District of Florida, RALEIGH H. LAWHON, a resident of Avon Park, Florida, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America, for the calendar year 1964, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, at Jacksonville, Florida, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $21,205.00, and that the amount of tax due and owing thereon was the sum of $5,130.00; whereas, as he then and there well knew, his taxable inc for the said calendar year was the sum of $113,502.06, upon which said taxable income he owed to the United States of America an income tax of $49,843.47; in violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

COUNT SEVEN

That on or about the 28th day of March, 1966, in the Middle District of Florida, RALEIGH H. LAWHON, a resident of Avon Park,

Florida, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America, for the calendar year 1965, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Jacksonville, at Jacksonville, Florida, a false and fraudulent income tax return wherein he stated that his taxable income for said calendar year was the sum of $20,672.00, and that the amount of tax due and owing thereon was the sum of $4,595.00; whereas, as he then and there well knew, his taxable income for the said calendar year was the sum of $39,161.39, upon which said taxable income he owed to the United States of America an income tax of $7,302.68; in violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

A TRUE BILL

Foreman

EDWARD F. BOARDMAN
UNITED STATES ATTORNEY

Assistant United States Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
ORLANDO, FLA.
DEC 11 1969
WESLEY R. THIES
CLERK

UNITED STATES OF AMERICA

v. No. 69-48-Orl-Cr

RALEIGH H. LAWHON

ANSWER TO DEFENDANT'S MOTION FOR FURTHER BILL OF PARTICULARS

Comes now the UNITED STATES OF AMERICA, through its United States Attorney and pursuant to the ruling of the Court on Friday, December 5, 1969 and its order from the Bench, furnishes the following information in answer to the defendant's Bill of Particulars:

1. Source and Amounts of Interest:

1962 (Count 1)

E. Ray Wells	$ 1,260.00
William Otto Foster	700.00
Tropical State Bank (Acct. #4825)	806.12
Avon Citrus Bank (Acct. #531)	483.55
Series E Bond #1894250 E	603.20
U. S. Treasury Notes (#30468 & 30469)	2,000.00
Series H Bonds	5,599.20
	$11,452.37
Reported on return	2,756.90
	$ 8,694.47

1963 (Count 2)

E. Ray Wells	$ 900.00
William Otto Foster	700.00
Tropical State Bank (Acct. #4825)	840.34
Avon Citrus Bank (Acct. #531)	440.14
U. S. Treasury Notes (#30468 & 30469)	2,000.00
Series H Bonds	6,281.80
	$11,162.28
Reported on return	7,250.00
	$ 3,912.28

1964 (Count 3)

E. Ray Wells	$ 540.00
William Otto Foster	506.25
Tropical State Bank (Acct. #4825)	874.44
Avon Citrus Bank (Acct. #531)	391.47
Series E Bonds, Numbered:	
M 4579511 E, M 2789541 E, M 4588642 E,	
M 4589552 E, M 2789540 E, M 4191203 E,	
M 4191217 E, M 4576316 E, M 4576317 E,	
M 4589553 E, M 6334643 E, M 6335788 E,	
M 6335787 E, M 6335790 E, M 6335789 E,	
M 6525397 E, M 6525396 E, M 6340001 E,	
M 6340000 E, M 6525395 E	12,820.80
U. S. Treasury Notes (#30468 & 30469)	2,000.00
Series H Bonds	5,953.50
Reported on return	$23,086.46
	6,104.00
	$16,982.46

1965 (Count 4)

E. Ray Wells	$ 180.00
Tropical State Bank (Acct. #4825)	914.42
Avon Citrus Bank (Acct. #531)	402.60
Series H Bonds	5,705.30
Reported on return	$ 7,202.32
	6,088.00
	$ 1,114.32

2. Source and Amounts of Fruit Income:

1963 (Count 2)

Florida Orange Marketers	$ 171,024.65
Keen Fruit Corporation	13,290.20
Grace D. Warner	35.00
Pardo Products Corp.	14,264.70
Southern Citrus Products	2,090.25
Frasure Hull, Inc.	2,191.50
Estell M. Miller	6.84
Paul Vilkaitis	556.30
G. B. Sherman	12.50
Margaret R. Beam	51.67
Mrs. E. P. Loomis	12.93
Total Gross	$ 203,536.54
Less: Reduction for fruit purchased (marketed for) others	41,800.33
Reported	$ 161,736.21
	116,039.00
	$ 45,697.21

1964 (Count 3)

B. C. Cook & Sons, Inc.	$ 4,144.00
Raymond Mattox	576.00
Margaret R. Beam	65.00
Paul Vilkaitis	174.25
Boswell D. Stone	37.44
Florida Orange Marketers, Inc.	86,903.53
Total Gross	$ 91,900.22
Less: Reduction for fruit purchased (marketed for) others	17,718.62
	$ 74,181.60
Reported	712.00
	$ 73,469.60

1965 (Count 4)

Florida Orange Marketers, Inc.	$ 45,931.56
Boswell D. Stone	16.50
Wilda Worley	53.56
Paul Vilkaitis	54.75
Grace D. Warner	24.75
Margaret R. Beam	28.56
Total Gross	$ 46,109.68
Less: Reduction for fruit purchased (marketed for) others	28,334.61
	$ 17,775.07
Reported	-0-
	$ 17,775.07

3. Omitted Income Other than Interest and Fruit:

1963 (Count 5)

Interest (See reply to Count 2)	
Fruit (See reply to Count 2)	
Keen Fruit Corporation (Pick & haul)	$ 72.14
Ben Hill Griffin, Inc. (Irrigation Service)	558.00
State of Florida (State gas tax refund)	250.32
T. Hayes Maxwell (Irrigation Service)	811.75
W. F. Morrison (Irrigation Service)	250.00
	$ 1942.21

1964 (Count 6)

Interest (See reply to Count 3)	
Fruit (See reply to Count 3)	
Griffin Fertilizer Company (Dividend)	$ 325.00
R. H. Lawhon Groves, Inc. (Dividend)	1,720.00
	$2,045.00
Less: Dividend exclusion	200.00
	$1,845.00

JOHN L. BRIGGS
United States Attorney

By: _____
Kendell W. Wherry
Assistant United States Attorney
P. O. Box 2593
Orlando, Florida 32802

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of Answer to Defendant's Motion for Further Bill of Particulars has been mailed to Herbert G. Goldburg of Goldburg, Putney, Taylor & Hampton, Esqs., 725 East Kennedy Boulevard, Tampa, Florida 33602 and Thomas D. Aitken of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P. O. Box 3239, Tampa, Florida 33601, Attorneys for Defendant this 11th day of December, 1969.

_____
Assistant United States Attorney

APPENDIX D

EXCERPT FROM TRIAL COURT'S CHARGE TO JURY

In each of the counts two through seven, there is a charge of an understatement of receipts from fruit sales on the return involved in each of said counts.

There is a disputed issue of fact as to this matter, as to whether large sums allegedly paid by checks to [sic] Florida Orange Marketers, Inc., to R. H. Lawhon Associates was income to the Defendant personally.

The Government contends that the receipts from Florida Orange Marketers, Inc., by the Defendant of checks made payable to R. H. Lawhon Associates was gross income to the Defendant Lawhon.

On the other hand, the position of the Defendant is that the checks did not represent income to him personally, but constituted income to other persons.

The Internal Revenue Code defines gross income of a taxpayer to be all income from whatever source derived.

That definition of income encompasses all accession to wealth, clearly realized and over which the taxpayer has complete domination.

Income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxes [sic] as income to him whether he sees fit to enjoy it or not and regardless of whether he has an obligation to make restitution to others.

The Defendant contends the receipts were derived from groves belonging to his children, and that therefore such receipts were not income to him.

You are charged that the mere fact that the Defendant may have received funds from the sale of fruit produced in the groves of his children and that he may have commingled such funds with funds of his own

exercising control thereover, is alone not sufficient to render the funds taxable income to the Defendant.

These are simply circumstances which may be taken into consideration by the jury along with the other evidence in the case to determine whether such funds constitute income to the Defendant.

Ordinarily income derived from property is taxable as income to the owner of the property. But there are exceptions to that rule: If a person other than the owner receives the income and the recipient has unfettered command and freedom to enjoy the income as his own at his option then such income may be taxable to him even though he did not own the property which produced the income.

Whether or not the receipts are derived as income from the recipient's own property or properties of others is a factor to be taken into consideration, but it is alone not necessarily determinative of the issue as to whether such receipts are taxable income to the recipient.

It is a question in the final analysis whether for all practical purposes the recipient has unfettered command over such receipts and whether he was free to enjoy it at his own option for so long as he sees fit to do so.

Unfettered command means the possession and ability to enjoy without any restrictions as to the use or accounting.

If you find from all the facts in the case that such receipts were income personally to the Defendant Lawhon, then such income should have been reported in the year or years received.

If such receipts were not income to the Defendant, then he had no obligation to report them on his returns.

Whether such receipts were income, and if income, were not reported and if not reported, whether such omissions were willful are, of course, matters of fact to be determined by you from all the evidence in the case.